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No. 05-1565

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DANIEL LEE MERRILL, SR.,

Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM H. FALLON
Counsel of Record
JENNIFER L. JORDAN
MILLER JOHNSON
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

Counsel for Petitioner

202181

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Has the Petitioner shown any compelling reason for this Court to review the *McDonnell Douglas* burden-shifting framework as applied in the context of a reduction in force, where Petitioner was not discharged because of or during a workforce reduction, where Petitioner did not present this issue for decision in the District Court or the Court of Appeals, and where there is no split among the Circuit Courts on the issue?

2. Has the Petitioner shown any compelling reason for this Court to review whether a disability must be the "sole" cause or only a "motivating" cause to prove a claim under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, where both the District Court and the Court of Appeals applied uniformly-accepted proof standards in analyzing the evidence, and where the semantic distinction between a "sole" cause and a "motivating" cause had no effect on either court's decision?

3. Has the Petitioner shown any compelling reason for this Court to review whether the ability to "interact with" coworkers constitutes a "major life activity" under the ADA, where Petitioner did not present this issue for decision in the Sixth Circuit, where there is minimal authority among the Circuit Courts on the issue, and where Petitioner cannot establish that he was substantially limited in this ability in any event?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Burke E. Porter Machinery Co., has no parent corporation and there is no publicly-held company that owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

I. SUMMARY OF PROCEEDINGS

This case arises under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. On June 8, 2001, Burke E. Porter Machinery Co. ("BEPCO") terminated the employment of Petitioner Daniel Merrill because he blatantly defied his supervisor's efforts to improve his serious and continuing performance problems.

Petitioner alleges that he has a "disability" under the ADA and that his discharge was motivated by the alleged disability (Compl. ¶¶ 1, 4, JA13).[1] In a thorough opinion (Pet. 11a), the District Court granted BEPCO's motion for summary judgment on the following grounds:

1. Petitioner failed to establish that he had a disability under the ADA, because the undisputed facts showed that he was not "substantially limited" in any "major life activity" (Pet. 76a-94a);

2. There was no "direct evidence" of disability discrimination (Pet. 117a-119a);

3. There was no circumstantial evidence of discrimination, and Petitioner could not establish a *prima facie* case of discrimination under *McDonnell Douglas* (Pet. 119a-120a); and

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1. "JA" refers to the pages of the Joint Appendix filed in the Sixth Circuit Court of Appeals. The District Court dismissed additional claims of retaliation and failure to accommodate, and Merrill did not appeal those decisions.

4. There was no evidence that BEPCO's nondiscriminatory reasons for terminating Petitioner's employment were pretextual (Pet. 120a).

The Sixth Circuit affirmed on the ground that there was neither direct nor circumstantial evidence of discrimination (Pet. 9a-10a). Merrill's petition for rehearing en banc was denied (Pet. 2a).

II. STATEMENT OF FACTS

A. *Background*

BEPCO designs and manufactures large specialized machines, including emission dynamometers and vehicle testing equipment. At the time of Merrill's termination, BEPCO employed approximately 197 employees (Palmer Aff. ¶ 1; JA 122).

Merrill became employed by BEPCO in May 1997 as a mechanical project engineer (Merrill Dep. 28, 93; JA 131; 303). The mechanical project engineer is responsible for designing a machine that meets the customer's specifications in a timely and profitable manner, and is ultimately accountable for any mistakes or problems with the design (Merrill Dep. 103, 105, 111, 123-124, 491-493; Palmer Dep. 35; JA 304-305, 143, 203-204; 267).

B. *Merrill's Performance Problems*

In the summer of 2000, Ralph Palmer became BEPCO's Director of Engineering. Palmer was charged with identifying and fixing quality problems within the engineering group (Palmer Dep. 13, 36-37; JA 262, 267). At the time, Merrill

was working in the "End of Line" engineering group (Merrill Dep. 178; JA 152). His supervisor was critical of Merrill's performance and complained to Palmer about Merrill's technical abilities and productivity (Palmer Dep. 19-20; Roodvoets Dep. 72-73; JA 263, 278).

In December 2000, at Merrill's request, he was transferred to the Dynamometer Engineering Group ("Dyno Group") under supervisor John Clawson (Merrill Dep. 178-179; Merrill Dep. Ex 33; JA 152-153; 247). Around April 2001, Clawson was transferred (Palmer Dep. 21; JA 263), and Palmer began directly supervising the Dyno Group engineers including Merrill (Palmer Dep. 18, 22; JA 263, 264).

In the spring of 2001, one after another of Merrill's projects had serious problems that required Palmer's attention (Palmer Dep. 24-34; JA 264-267) (Palmer Aff. ¶ 2; JA 122). It is undisputed that the following problems occurred on machines Merrill designed and were brought to his attention:

1) *2-Wheel-Drive Dynamometer for General Motors-Delphi)*: In the spring of 2001, this machine required significant re-work in the shop and repairs had to be done at the customer's site in Rochester, New York (Merrill Dep. 276-277, 340-341, 513; JA 167, 177, 208).

2) *4-Wheel-Drive Post Restraint System for Ford*: In the spring of 2001, BEPCO's shop personnel became very upset and several meetings were called, because Merrill had specified unnecessarily difficult and expensive machining, failed to include welding instructions, and provided inconsistent assembly instructions (Merrill Dep. 358, 479-483; JA 180, 201-202) (Palmer Dep. 27-

31; JA 265-266). He also specified a tap that BEPCO did not stock, and work on the project had to stop for several days until the fabrication department was able to obtain the new tap (Merrill Dep. 482-483; JA 202).

3) *4WD dynamometer for GM-Milford)*: In the spring of 2001, the centering lift system on this machine failed as BEPCO was preparing to ship it to the customer (Merrill Dep. 231, 243, 272-273; JA 161, 162, 166). Also, the machine was mistakenly designed with fasteners in both SAE (or inch) measurements and metric measurements incorporated into the same machine (Merrill Dep. 245-246, 428; Palmer Dep. 31-32; JA 162, 192; 266). Plaintiff testified: "I will admit having the frame [of the machine] basically metric and having the [motor] basically SAE was not good" (Merrill Dep. 430-431; JA 193). There were also fabrication and machining problems on some of the parts Merrill designed for this machine (Merrill Dep. 348; Palmer Dep. 31-32; JA 179; 266). A recovery plan was put into place because the project, which Merrill described as a "fiasco," was substantially late (Merrill Dep. 349, 471; JA 179, 199).

4) *Motorcycle Dynamometer for Jialing:* Several days before Merrill was terminated, Palmer told him to look over the centering system on this machine because shop personnel reported that it was loose and that the pivot bolt Merrill had designed was too small (Merrill Dep. 36, 274, 476-477; Palmer Dep. 32; JA 132, 167, 201; 266). On the day Merrill was terminated, Palmer called him to the machine shop because the machine could not be assembled the way Merrill had designed it (Merrill Dep. 360-361; Palmer Dep. 32; JA 180; 266). (This was the incident that led up to Merrill's termination.)

5) *Tandem axle roll brake test machine for Hyundai*: Merrill acknowledged that there were "a lot of issues" with this project and it was "a huge service nightmare" (Merrill Dep. 252; JA 164). In the spring of 2001, the machine's rollers were causing tire damage at the customer's site in Korea, and BEPCO employees had to travel there to service the machine (Merrill Dep. 249, 252; JA 163-164). Also, a belt tensioner Merrill designed broke during operation; Merrill redesigned the part, the new part was made and installed, but it broke again (Merrill Dep. 246, 249; JA 162, 163). The machine kept falling apart, and others at BEPCO believed it was under-built, under-powered, and never should have been sold (Merrill Dep. 278; JA 168).

6) *Automatic chocking system for Ford*: On May 14, 2001, the customer reported a "major failure" on this machine and said the "system is inoperable" (Merrill Dep. 293, 297; Merrill Dep. Ex. 14; JA 171, 172; 227). Merrill's design error caused a failure of the mechanism that was used to chock the vehicle's tires (Merrill Dep. 287-288, 297; JA 170, 172). Merrill also failed to design the machine to accommodate tires of up to 36 inches as the customer had specified (Merrill Dep. 291-292; JA 171).

7) *Rolling master for KIA:* Merrill used an inappropriate wheel assembly, causing a front wheel to come loose during use at the customer's site in Korea. BEPCO employees had to travel to Korea to service the machine. In addition, the rear hub became loose due to Merrill's failure to add a thrust key or to provide appropriate assembly instructions (Merrill Dep. 311, 317, 326-327, 330-331; JA 173-176).

Palmer discussed these issues with Merrill during the months before his termination and made it clear that Merrill needed to improve (Palmer Dep. 37-39; JA 267-268; Merrill Dep. Ex. 46, p3, and Merrill Dep. 534-536; JA 259, 212-213). Due to the frequent problems with Merrill's projects, Palmer increasingly lost confidence in Merrill's engineering abilities (Palmer Dep. 37-39; JA 267-268) (Palmer Aff. ¶ 2; JA 122).[2]

C. *Merrill's Termination*

On June 8, 2001, Palmer told Merrill that problems had been encountered with a motorcycle dynamometer Merrill designed (Merrill Dep. 521-522; JA 210). Palmer asked Merrill to follow him to the fabrication shop (Merrill Dep. 521; Merrill Dep. Ex. 45; JA 210; 254). Lying on a table in the shop were some of the parts Merrill had designed for the dynamometer (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Al Preisner, Assembly Manager, pointed out that the parts could not be assembled as Merrill had drawn them (Merrill Dep. 521-522, 525, 360-361; JA 210, 211, 180). Merrill said "shit," realizing the parts would need reworking (Merrill Dep. 522, 525; Merrill Dep. Ex. 45; JA 210, 211; 254).

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2. When Merrill interviewed with BEPCO for a position as a mechanical project engineer in early 1997, he represented on his resume that he expected to graduate that fall from Kennedy-Western University with a bachelor's degree in mechanical engineering (Merrill 74, Merrill Dep. Ex. 1; JA 141; 216). As BEPCO later learned, however, Merrill actually had very little education in mechanical engineering, never completed any course work at Kennedy-Western University, and knew that he was not going to complete a degree program as he represented (Merrill Dep. 76-87; JA 299-302).

Preisner left the conversation, and Palmer then asked Merrill: "Why is *[sic]* there always mistakes on your jobs[?]" (Merrill Dep. Ex. 45; JA 254). Merrill said he had no control over the detailers and checkers upon whom he relied (Merrill Dep. Ex. 45; JA 254). Palmer said he thought the problem was that Merrill was "technically incompetent" and could not "draw worth a shit" (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Merrill asked Palmer: "How would [you] know?" (Merrill Dep. 522; JA 210). Merrill told Palmer: "You are out of line" (Merrill Dep. Ex. 45; JA 254). Palmer said several times he was thinking of firing Merrill (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Merrill told Palmer: "You won't get away with it" (Merrill Dep. 523; Merrill Dep. Ex. 45; JA 210; 254). Palmer then escorted Merrill to the Human Resources office and out of the building (Merrill Dep. Ex. 45; JA 254).

Palmer, the sole decision maker in Merrill's termination, explained the reasons for his decision as follows:

> I had issues in Engineering. I was tasked with all of Engineering, that includes quality. There's only two things you can do. Fix them or remove them. When he made it clear that he would not recognize he had issues, wouldn't work with me on those issues, wouldn't accept me as his boss, I was only left with that second option, and that was to remove him.

(Palmer Dep. 37; JA 267).

After Plaintiff was terminated, BEPCO did not replace him. During the summer and fall of 2001, the company terminated several employees in a workforce reduction. (Palmer Aff. ¶ 4; JA 123).

D. *Merrill's Alleged Disability*

Gailord Weeks, Ph.D., Merrill's counselor and psychological expert, testified that Merrill has difficulty interacting socially or interpersonally in that he tends to be withdrawn or isolated (Weeks Dep. 25; JA 283). But Merrill is able to interact socially to some degree, and "is very capable on the surface of forming relationships" (Weeks Dep. 24-25, 76; JA 283, 291). Dr. Weeks testified: "Dan does have social skills. I mean, they are limited in some ways, and particularly when it comes to more intimate personal relationships or friendships or whatever" (Weeks Dep. 76-77; JA 291). Dr. Weeks had no reason to believe that Merrill's social difficulties impaired his ability to function at work (Weeks Dep. 32; JA 285). Dr. Weeks associated the deficits in social interaction and eye contact with a mental disorder known as Asperger's Syndrome (Weeks Dep. 28-29, 49; JA 284, 287).

Dr. Weeks testified that Merrill's eye contact was "reasonably good" and that Merrill could present well in many settings (Weeks Dep. 35-36; JA 286). Dr. Weeks did not believe that Merrill, while at BEPCO, would have appeared to a lay person to have a mental disorder (Weeks Dep. 35-36; JA 286).

The following facts (from Merrill's own testimony) demonstrate that he is not substantially limited in his daily life by his alleged impairments:

- Merrill interacted daily with many people at BEPCO with whom he had "good" – even "great" – relationships, including one particular supervisor who was known for having conflicts with "a lot" of

employees (Merrill Dep. 30, 131-141, 156-157, 165-166, 210, 214; JA 131, 145-147, 149, 151, 157, 158).

- He teaches "a lot" of people how to fish, including friends and referrals, and took coworkers to his riverfront home to teach them how to fish (Merrill Dep. 62, 72-73, 211-212; JA 138, 141, 158).

- He had "friends" at other machine shops, and called on them for assistance when BEPCO had a high volume of work (Merrill Dep. 215; JA 159).

- Merrill was married three times, once for six years; his relationship with his first wife is "excellent"; he maintains a good social and personal relationship with his second wife; and he has social conversations with his third wife regarding visitation issues (Merrill Dep. 22, 25-27, 45; JA 129-131, 134).

- He has an "excellent" relationship with his son and step-son, and communicates regularly with his son by e-mail and the telephone (Merrill Dep. 25-27; JA 130-131).

- He can communicate, interact socially and conduct himself appropriately, except in unusually antagonistic circumstances, or when too many people are talking at the same time (Merrill Dep. 379, 381-384; JA 183-184).

- Merrill agrees with the statements in his 1999 employee appraisal that he was "an effective communicator" and "effective listener" who could "present his ideas orally and in writing," and that he

"works very well with others" (Merrill Dep. 219-220; Merrill Dep. Ex. 9; JA 160; 220).

- He held regular employment with a number of companies for eighteen years before his employment at BEPCO and has had responsibility for hiring and firing personnel (Merrill Dep. 39, 544; Merrill Dep. Ex. 1; JA 133, 215; 216).

- Merrill graduated from high school with a grade point average of 2.497 (Merrill Dep. 505-506; JA 206), and claims to have completed college level courses (Merrill Dep. 74-75; JA 141-142). He has completed computer training courses on Excel, CadKey and Desktop software programs; studied psychology, human development and patent law on his own; took a paralegal course; and continues to study advanced photography (Merrill Dep. 44, 46-48, 52-54, 59, 60-62, 506; JA 134-136, 138, 206; Pl.'s Resp. 1st Interrog. No. 4; JA 225).

- He owned a photography studio at one time and still interacts with people regarding his photography services (Merrill Dep. 59, 60-62; JA 138).

- While at BEPCO, he wrote: "I believe that I work with a mental intensity higher than most, which allows me to complete more assignments in a lesser amount of time. Through practice, I can mentally work on varied projects at the same time. (Physically work on one, mentally work on three or four.)" (Merrill Dep. 202; Merrill Dep. Ex. 6, JA 156; 218).

- He told people at BEPCO that he has genius-level intelligence and that he can envision machines and concepts in ways in which other people cannot (Merrill Dep. 183-184; Palmer Dep. 49-53; Roodvoets Dep. 71; JA 154; 269-270; 278).

- He is able to care for himself in all respects (Merrill Dep. 378; JA 183).

E. *Misstatements in Petitioner's Statement of the Case*

1. Petitioner states that he was employed by BEPCO for five years (Pet. 2). In fact, he was employed for four years, from May 19, 1997 to June 8, 2001 (Merrill Dep. 28, 93; JA 131; 303). He also claims that he "functioned successfully as a non-degreed engineer for Defendant" for a number of years (Pet. 2). This broad generalization is inconsistent with Petitioner's testimony (and the District Court's findings) regarding the problems with Petitioner's machine designs in 2001, described above.

2. Petitioner's description of the exchange leading up to his termination is materially incorrect due to selective omissions. Petitioner's description omits the undisputed fact that when he was shown the parts he had designed that could not be assembled he responded "shit," which was the first profanity uttered in the conversation (Merrill Dep. 522, 525; Merrill Dep. Ex. 45; JA 210, 211, 254). The Petition also fails to disclose that Petitioner asked Palmer "how would you know?", after Palmer said that Merrill was "technically incompetent" and could not "draw worth a shit" (Merrill Dep. 522; JA 210). Petitioner also failed to mention that when Palmer said that he was thinking of firing Merrill, Merrill responded "you won't get away with it" (Merrill Dep. 523;

Merrill Dep. Ex. 45; JA 210, 254). In summary, Petitioner's Statement of the Case belittles Palmer's conclusion that Petitioner was unwilling to take Palmer's direction and improve his performance, yet Petitioner omits the very statements that Petitioner undisputedly made that demonstrate the reason for Palmer's conclusion.

3. Petitioner states that BEPCO "fired him because of his disability" (Pet. 2). This is only Petitioner's contention, not a fact. Both the District Court and the Court of Appeals found that there was no evidence to support this contention.

4. Petitioner asserts that "Defendant BEPCO maintained that Plaintiff Merrill was fired for poor performance" (Pet. 6). On the contrary, Respondent has consistently stated and shown that Petitioner was fired because of his defiance of Palmer's supervisory authority and his refusal to recognize the need to improve his performance.

5. Petitioner states that "during the time of [his] termination, Defendant BEPCO laid off a number of other employees due to a reduction in force (RIF)" (Pet. 3). This statement is misleading, as it incorrectly suggests that a workforce reduction was a factor in Petitioner's dismissal, and that the layoff of other employees had already begun when Petitioner was discharged on June 8, 2001. Other BEPCO employees were laid off during the summer of 2001, after Petitioner's discharge (Palmer Aff. ¶ 4; DC Op 94; JA 117).

SUMMARY OF THE ARGUMENT

There is no compelling reason for this Court to consider and decide the questions presented by the Petition, for the following reasons:

1. Whether the *McDonnell Douglas* formula should be modified for cases involving a reduction in force ("RIF"): The Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals" on this question, Sup. Ct. R. 10(a), because the Sixth Circuit did not enter any decision on this question. Petitioner did not present this question to the Sixth Circuit, just as he did not raise the issue in the District Court. Second, the question is not presented on the facts of this case, because Petitioner was not discharged during or because of a RIF. Third, there is no meaningful split of authority among the Circuit Courts on this question.

2. Whether a disability must be the "sole" cause or only a "motivating" cause to establish a claim under the ADA: The Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals," Sup. Ct. R. 10(a), because the Sixth Circuit did not decide this issue. Because both the District Court and the Court of Appeals applied well-established principles in determining that there was neither circumstantial nor direct evidence of discriminatory intent, the question of whether the causation requirement is described as a "sole" or "motivation" cause test is not relevant to either court's decision.

3. Whether the ability to "interact with others" is a "major life activity" under ADA: This issue is not presented on the facts of this case, because Petitioner did

not make this allegation in his complaint, he did not present the question to the Sixth Circuit, and the Sixth Circuit did not decide it. As a result, the Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals" on this question. Sup. Ct. R. 10(a). Second, there are simply too few Circuit Court decisions on this issue to show a meaningful split of authority. Third, the undisputed facts (as found by the District Court without objection Petitioner on appeal) demonstrate that Petitioner is not "substantially limited" in the ability to "interact with others."

ARGUMENT

In his effort to obtain an audience with this Court, Petitioner has undertaken a wholesale restructuring of his case strategy. He asks this Court to consider two questions (the "RIF" standard and "interacting with others") that he never raised in the Sixth Circuit. One of those (the "RIF" question) he did not raise even in the District Court. The third issue is the semantic matter of the title to be given to a causation standard ("sole" versus "motivating" cause) which has played no role in the analysis or decisions of the District Court and the Court of Appeals.

Petitioner argues that that there are "splits of authority" among the Circuit Courts on the issues he presents, but scrutiny of the relevant decisions demonstrates that there is not. Ultimately, Petitioner's questions are not even presented on the facts of this case. There is no valid reason for this Court to grant the Petition.

I. THERE IS NO REASON FOR THIS COURT TO CONSIDER AND DECIDE WHETHER THE *MCDONNELL DOUGLAS* FORMULA SHOULD BE MODIFIED IN THE CONTEXT OF A REDUCTION IN FORCE.

A. *This Issue Is Not Properly Before This Court Because Petitioner Did Not Present It To The District Court Or The Court Of Appeals.*

Petitioner's suggestion that his burden of proof should have been modified because of a *reduction in force* never appears in the appeal brief, reply brief, or petition for rehearing that he filed in the Sixth Circuit. And he never advanced this notion in the District Court.

Perhaps in an effort to create the appearance that he raised the issue below, Petitioner presents the issue to this Court as follows:

> The Sixth Circuit affirmed the decision of the District Court, holding that Plaintiff Merrill's failure to satisfy the replacement prong of the *McDonnell Douglas* test was "fatal" to his case (App. 10a n.2), **even though the case involved a RIF in which employees are not normally replaced.** Notably, in his appeal brief, Plaintiff Merrill relied on several cases to support the application of a modified *McDonnell Douglas* test, including *Kline v. TVA*, 128 F.3d 337, 348-349 (6th Cir. 1997), *rehearing and suggestion for rehearing in banc denied*, 1998, (a plaintiff may establish discrimination either by introducing direct evidence of discrimination or by proving

> inferential and circumstantial evidence which would support an inference of discrimination) and *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995) ("a plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by the defendant or by showing the existence of facts which create an inference of discrimination." (internal citations omitted)).

(Pet. 7-8; emphasis supplied). But neither the District Court nor the Sixth Circuit made any ruling about the effect of a RIF on the *McDonnell Douglas* test, because Petitioner never asked them to. Further, the "modified *McDonnell Douglas* test" that Merrill asked the Sixth Circuit to apply (and the *Kline* and *Talley* cases he cited to support it) had nothing to do with a reduction in force. Instead, what Petitioner asked the Sixth Circuit was to recognize a third method of inferring discriminatory intent – in addition to the "direct evidence" and *McDonnell Douglas* methods – a method Petitioner described as the "reasonable inference" theory (Pet. 9a-10a).

Petitioner's request to have this Court apply a RIF-adjusted *McDonnell Douglas* burden of proof is nothing more than a belated change in his strategy. It is not a protest of substantial error below, and this Court should not condone it.

B. *The Sixth Circuit's Decision Is Not Contrary To The Supreme Court's Decision In O'Connor v. Consolidated Coin Caterers Corp.*

Petitioner argues that the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310 (1996), is inconsistent with the Sixth Circuit's ruling that he could not present a *prima facie* case because he was

not replaced (Pet. 3, 12, 17, 25-26). To the contrary, *O'Connor* actually clarified the replacement requirement of *McDonnell Douglas*, thereby implicitly reaffirming it. Nothing this Court said in *O'Connor* decision is inconsistent with the Sixth Circuit's analysis or decision in this case.

The plaintiff in *O'Connor* was discharged when he was 56 years old, and was replaced by a 40 year-old. The Fourth Circuit held that O'Connor could not establish a prima facie case of age discrimination because his replacement was not *outside* the class protected by the Age Discrimination in Employment Act. The Supreme Court reversed, holding that O'Connor did not have to prove he was replaced by someone younger than 40 to establish a *prima facie* case. Whether the replacement was under age 40, the Court explained, had no logical connection to whether the plaintiff was a victim of age discrimination:

> The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40 year-old is replaced by a 39 year-old than when a 56-year-old is replaced by a 40 year-old.

O'Connor, 517 U.S. at 312 (emphasis in original).

But contrary to Petitioner's insinuation, the *O'Connor* Court did not abandon the replacement element of the *McDonnell Douglas* test. The Court's conclusion actually reaffirmed the importance of that element:

> Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

Id. at 313.

Petitioner argues that the replacement element cannot apply here under *O'Connor* because, in Petitioner's view, that element has no logical relationship to the question of whether there was disability discrimination. But *O'Connor* reaffirmed that the replacement element remains part of the *McDonnell Douglas* formula. It simply rejected the notion that age discrimination could not be inferred unless the replacement was less than 40 years of age. That analysis simply does not apply here. There is no reason why the replacement of a disabled employee by a non-disabled employee would not bear a logical relationship to the question of whether disability discrimination had taken place.

C. *There Is No Meaningful Circuit Split On Whether The McDonnell Douglas Standard May Be Modified To Account For The Unique Characteristics Of A Reduction In Force.*

Petitioner asserts that there is "a split of authority among the Circuit Courts of appeal" as to "whether the *McDonnell Douglas* test should be modified in the RIF context" (Pet. 3). This contention is groundless.

All of the federal Circuits Courts have considered the application of *McDonnell Douglas* in a case in which a discharge occurred in an employer's economically-motivated workforce reduction. Because employees terminated in a downsizing are rarely if ever "replaced," the circuits have recognized that it is generally impossible for a plaintiff to satisfy the fourth element of the *McDonnell Douglas* test, which requires a discharged plaintiff to show that he was replaced by someone outside the protected group. *There is no division among the circuits on this point.*[3] Different circuits have used slightly different words to describe their

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3. *See, e.g., Hidalgo v. Overseas Condado Insurance Agencies*, 120 F.3d 328 (1st Cir. 1997); *Montana v. First Federal Savings & Loan Association*, 869 F.2d 100 (2d Cir. 1989); *In Re: Carnegie Center Associates*, 129 F.3d 290 (3d Cir. 1997); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993); *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982); *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 211 (1990); *Bellaver v Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000); *Holley v. Sanyo Manufacturing, Inc.* 771 F.2d 1161 (8th Cir. 1985); *Nesbit v. Pepsico Inc.*, 994 F.2d 703 (9th Cir. 1993); *Jones v. Unisys Corp.*, 54 F.3d 624 (10th Cir. 1995); *Earley v. Champion International Corp.*, 907 F.2d 1077 (11th Cir. 1990); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343, (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 488 (1983).

adjustment of the standard in the RIF context.[4] But these are variations on the same theme, not inconsistent rules. They do not suggest that the Circuit Courts would reach substantially different results, and certainly do not reveal a division of authority that is crying out for resolution by this Court.

D. *A "RIF"-Based Burden of Proof Formula Would Not Apply On The Facts Of This Case, Because Petitioner Was Not Discharged As Part Of A Reduction In Force And The Reasons For Modifying The Standard Do Not Apply Here.*

Because Merrill was not discharged during or because of a reduction in force, the decisions which approve a modification to the *McDonnell Douglas* standard in the RIF setting do not apply here.

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4. To replace the replacement element of *McDonnell Douglas*, some Circuits have considered whether "younger persons were retained" in the reduction. *See, e.g., Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 104 S. Ct. 488 (1983); *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1111 (1st Cir. 1989); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2d Cir. 1983). Other Circuits have required the plaintiff to produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *See, e.g., Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982); *Nesbit v. Pepsico Inc.*, 994 F.2d 703 (9th Cir. 1993). Others have stated that the fourth element may be met by circumstantial evidence that a plaintiff was treated less favorably in a reduction than younger employees. *See, e.g., Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1454 (10th Cir. 1994); *Hebert, supra* at 1111.

As described in *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993), a reduction in force occurs "where a group of employees is discharged because of the company's economic conditions." Thus, in order to proceed under the Fourth Circuit's modified *prima facie* case formula, a RIF plaintiff must show that "he was selected for discharge from a larger group of candidates." *Id.* at 1315. The RIF model plainly does not fit the present case, because Merrill was not discharged "because of the company's economic conditions" and was not "selected for discharge from a larger group of candidates."

While all of the Circuit Courts have modified the *McDonnell Douglas* scheme in the RIF setting, they have not simply eliminated the "replacement" requirement. All have required some alternative evidentiary showing that would give rise to an inference of discrimination. For example, in *Mitchell*, the Fourth Circuit required the plaintiff to show that "he was performing at a level substantially equivalent to the lowest level of those of the group retained," *and* that the remaining work force contained "some unprotected persons who were performing at a lower level than that at which he was performing." *Id.* at 1315. The Third Circuit has expressed a slightly different but not inconsistent formulation, holding that a plaintiff in a RIF age discrimination case may establish a *prima facie* case by showing that the employer retained a "similarly situated" younger employee. *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002).

Of the various RIF-based adjustments to *McDonnell Douglas*, Petitioner's evidence satisfies none of them. All of those variations require some measure of *evidence* – more than the mere fact that a protected class member was

discharged and not replaced – to support an inference that "the employer intended to discriminate in reaching the decision at issue." *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982). But there is no such evidence in this case.

II. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER A DISABILITY MUST BE THE "SOLE CAUSE" OR ONLY A "MOTIVATING CAUSE" IN ORDER TO ESTABLISH A DISCRIMINATION CLAIM, BECAUSE THE ISSUE MAKES NO DIFFERENCE IN THIS CASE AND THE SIXTH CIRCUIT DID NOT DECIDE IT.

Petitioner asks this Court to decide whether a disability must be the "sole" cause of his discharge, or only a "motivating" cause, to establish a claim under the ADA. Petitioner correctly observes that in prior decisions the Sixth Circuit has commented that a disability must be the "sole cause" of a discharge in order to establish a violation of ADA. *See, e.g., Walsh v. UPS*, 201 F.3d 718, 725 (6th Cir. 2000); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996). But this case presents no reason for the Court to consider whether that title is correct, because the issue could not possibly make any difference in the outcome of this case.

It is important to note that the Sixth Circuit did not decide this question, even though Merrill raised it in his brief to that Court. In analyzing whether Merrill's discharge was "caused" by his alleged disability, the Sixth Circuit used the widely-accepted method of analysis:

> A plaintiff may establish unlawful discrimination by introducing direct evidence of intentional

> discrimination, including evidence that the employer relied on the plaintiff's disability in making its employment decision. *See Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). Where no direct evidence of discrimination exists, a plaintiff must proceed under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817 (1973).

(Pet. 7a). In its analysis of Merrill's evidence, the court of appeals first evaluated and rejected his claim that there was direct evidence of disability discrimination. The court then commented that "Merrill admits that he cannot" establish a *prima facie* case of discrimination "because there is no evidence that he was replaced or that his position was held open" (Pet. 9a).

There is nothing about this analysis that would have been affected by the selective use of either a "sole cause" or "motivating cause" standard. The same analysis of whether there is direct evidence and circumstantial evidence is applied by courts that use the term "motivating factor" to describe the causation standard they apply. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Consequently, it was utterly unnecessary for the Sixth Circuit to decide the issue, and it did not. While the District Court referred to the "sole cause" standard (Pet. 117a), the District Court likewise conducted its analysis using the same standards that are us for evaluating direct and circumstantial evidence

It is of no consequence to observe that other circuits say that a disability must be a "motivating cause" to establish an ADA violation. Whether or not that conceptual difference constitutes a "circuit split," the Sixth Circuit's decision in this case does not define a circuit split, because this decision is not

"in conflict with the decision of another United States court of appeals" as contemplated by Sup. Ct. R. 10(a). An opinion that does not decide an issue cannot be in conflict with another circuit on that issue. And a non-decision should not be reviewed on the premise of resolving a split that can only be found in cases that are not before the Court.

III. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER "INTERACTING WITH OTHERS" IS A "MAJOR LIFE ACTIVITY" FOR PURPOSES OF THE ADA, BECAUSE THE ISSUE MAKES NO DIFFERENCE IN THIS CASE AND THE SIXTH CIRCUIT DID NOT DECIDE IT.

A. *Plaintiff Never Presented To The Sixth Circuit The Issue Of Whether Interacting With Others Is A Major Life Activity Under ADA, And The Sixth Circuit Never Decided It.*

The third question Petitioner submits represents another change in strategy. Petitioner never asked the Sixth Circuit to decide whether "interacting with others" is a major life activity under the ADA. The Sixth Circuit, of course, did not consider or decide it.

In introducing the issue for this Court's consideration, Petitioner emphasizes his disagreement with the *District Court's* treatment of the issue, but is conspicuously silent (as he must be) with regard to the Sixth Circuit's treatment of it:

> Another disputed issue in Defendant's Motion [for summary judgment] was whether Plaintiff Merrill's inability to interact with others substantially limited him in his ability to work. The District Court erroneously recast the ability to "interact with" others

> as the ability to "get along with" others. . . . The U.S. Magistrate Judge even analyzed a First Circuit opinion on this issue, but he ultimately failed to distinguish between the ability to "interact" with others and the ability to "get along with" others, concluding that: "Plaintiff's purported inability to get along with co-workers is not a 'major life activity' within the meaning of the ADA."

(Pet. 7).

Petitioner never presented the District Court or the Court of Appeals with what he presents here as an all-important distinction between the ability to "interact" with others and the ability to "get along" with others. His complaint did not allege that he was substantially limited in the major life activity of "interacting with others;" he did not identify the issue by evidence or argument in his brief in opposition to BEPCO's motion for summary judgment; and he made absolutely no mention of the "ability to interact with others" in his briefs to the Court of Appeals.

To the contrary, the entire focus of Merrill's contention in the Court of Appeals was that his ADA disability lay in the alleged limitation in his ability "to make eye contact" (Appellant's Br. 5, 13, 21, 23, 26-28; Appellant's Reply Br. 5, 7, 8). This point is crystallized by the following statement on page 28 of Appellant's Brief:

> Turning to the case at bar, the disabling criterion applied by Defendant was that Plaintiff make eye contact with his supervisor.

Petitioner's amended theory of disability is not an appropriate subject for review by this Court.

B. *There Is No Circuit Split On The Issue of Whether Interacting With Others Is A Major Life Activity.*

Petitioner asserts that there is "a split of authority among the Circuit Courts of appeal" as to "whether one's ability to interact with co-workers is a major life activity under the ADA" (Pet. 3). To the contrary, there is a substantial lack of authority on this point, and the scant opinions that address it did not demonstrate any genuine circuit split on this issue.

Petitioner urges, as shown above, that there is an important distinction between the activities of "interacting with others" and "getting along with others." The First Circuit held that the ability to "get along with co-workers" is *not* a major life activity. *Soileau v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997). But Petitioner would presumably contend that *Soileau* is not on point, because Petitioner now contends that his disability lies in "interacting with" rather than "getting along with" others. In that regard, only two Circuit Courts have reached the issue of whether "interacting with others" could be a major life activity, with both answering in the affirmative. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 204 (2d Cir. 2004); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2689 (2000).

Curiously, Petitioner's statement that there is a "significant split of authority" appears in his Petition immediately after he highlights the *absence* of authority on the point, by reiterating the Second Circuit's observation in *Jacques* that the Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have noted the question but declined to decide it (Pet. 25). An absence of authority is not a split of authority. And two Circuit Court decisions, both answering

"yes" to whether "interacting with others" can be a major life activity, do not constitute a split of authority.

Because the Sixth Circuit did not decide the issue in this case, its decision is not in conflict with that of any other Circuit, and this is not an appropriate case to be considered on that basis under Sup. Ct. R. 10(a). To grant a writ of certiorari in a case in which the Circuit Court has not decided the issue, the Supreme Court would be deprived of the lower court's analysis of the issue and its examination of the case-specific evidence that may be relevant to it. To grant a writ when only two Circuits have ruled on an issue, the Court would be deprived of the developed body of legal thought that should emerge after thorough analysis by several panels of Circuit Courts in a wide variety of factual and procedural settings.

Because the law on this question is largely undeveloped in the District and Circuit Courts, and because the Sixth Circuit did not decide it in this case, there is no valid reason for this Court to consider it now.

C. *Whether Interacting With Others Is A Major Life Activity Is Of No Relevance To The Outcome Of This Case, Because Petitioner Did Not Appeal The District Court's Finding That He Is Not Substantially Limited In That Activity.*

The District Court found that Petitioner was not substantially limited in ability to interact with others (Pet. 92a – 94a), and Petitioner did not appeal that finding. With regard to a substantial limitation of a major life activity, his only contention on appeal was that he was limited in his ability to make eye contact. Therefore, even if this Court

were to consider whether "interacting with others" is a major life activity, the outcome of that decision could not affect the outcome of this case.

Observing that interacting with others "is essentially mechanical," the Second Circuit in *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004) described the degree of limitation required to establish an ADA disability:

> We hold that a plaintiff is "substantially limited" in "interacting with others" *when the mental or physical impairment severely limits the fundamental ability to communicate with others.* This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these activities. This standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is in appropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.

386 F.3d at 203 (emphasis added). Petitioner's evidence falls far short of this standard. The undisputed facts show that he certainly possessed the "fundamental ability to communicate with others" and could "initiate contact with other people and respond to them." As a result, whether the Supreme Court

decided that "interacting with others" is or is not a "major life activity" under ADA, the outcome of this case would not change. A writ of certiorari on this question is unwarranted.

IV. THIS CASE DOES NOT HAVE NATIONAL IMPORTANCE THAT WOULD WARRANT SUPREME COURT REVIEW.

This case has been very important to the parties, and it has consumed the time and resources of the parties, the District Court and the Sixth Circuit in full measure. Without denigrating that importance, the candid truth is that it is not a case with profound jurisprudential importance within or beyond the Sixth Circuit. In particular, Petitioner's prediction that denial of his Petition will inflict dire consequence on persons with disabilities in the Sixth Circuit is wholly unfounded. His specious argument betrays a severe misunderstanding of what the Sixth Circuit decided.

First, Petitioner predicts that "[i]f the Sixth Circuit's precedent stands, no individual with a qualifying disability who was fired during a RIF and who does not have direct evidence of discrimination will be able to sustain a prima facie claim of discrimination under the ADA" (Pet. 27). It is absolutely certain that the Sixth Circuit's decision in this case will *not* have that effect. It will never even be cited in argument over the burden of proof for an ADA plaintiff who is discharged in a RIF, because the Sixth Circuit did not decide *anything* about that question. If there is Sixth Circuit "precedent" on this issue, as Petitioner suggests, it is not found in its opinion below.

Second, Petitioner threatens that "if an individual within the jurisdiction of the Sixth Circuit suffers from a disability that includes an inability to interact with co-workers – as Plaintiff Merrill in the case at bar – such an individual will not be deemed

qualified to sustain a claim for discrimination under the ADA within the bounds of the Sixth Circuit Court of Appeals" (Pet. 28). Once again, Petitioner imagines that the Sixth Circuit decided something that it did not. Someday the Sixth Circuit may decide whether the "interacting with others" is a major life activity under ADA, and what it means to be "substantially limited" in that activity. But it was not presented with that question in this case, and its opinion below cannot possibly be read to reflect a view on it. The Court expressly stated that it was *not* addressing the issue of whether Merrill "was 'disabled' within the meaning of the ADA," which subsumes any issue of whether Merrill was "substantially limited" in any major life activity.

The Sixth Circuit left these issues open to be explored and developed by the District Courts and Circuit Courts in future cases, as they should be. The Supreme Court should do the same.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM H. FALLON
Counsel of Record
JENNIFER L. JORDAN
MILLER JOHNSON
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

Counsel for Petitioner